No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY AND JEWELL RIDGE COAL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENT LUKE R. RAY

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QUESTIONS PRESENTED

1. Whether the interim presumption as set forth at 20 C.F.R. 727.203(a) is triggered automatically by the introduction of one piece of qualifying medical evidence.

2. Whether the burden of proof under 20 C.F.R. 727.203(a) is controlled by the Administrative Procedure Act or the regulation itself as promulgated by the Secretary of Labor.

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OPINIONS BELOW

The Respondent, Luke R. Ray, hereby adopts the citations to the opinions delivered in the court below as set forth in Petitioner's brief at page 1.

JURISDICTION

The Respondent, Luke R. Ray, hereby adopts the grounds of jurisdiction of this Court as set forth in Petitioner's brief at page 2.

STATUTES AND REGULATIONS INVOLVED

The Respondent, Luke R. Ray, hereby adopts the Statutes and Regulations Involved in this case as set forth in Petitioner's brief at pages 2-5.

STATEMENT OF CASE

The Respondent, Luke R. Ray, is a former miner who filed a claim with the Secretary of Labor for black lung benefits. At the hearing on his claim, medical evidence was introduced which included one positive X-ray and two positive ventilatory studies. Despite this evidence, the administrative law judge concluded that the interim presumption under 20 C.F.R. 727.203(a) had not been triggered after weighing other negative studies, denied the respondent benefits, and the Benefits Review Board affirmed. The Fourth Circuit subsequently consolidated respondent's case with those of the other non-federal respondents and heard them en banc. Upon review of several prior decisions to the contrary, the court held that the interim presumption under subsection 203(a) is triggered by one item of qualifying medical evidence. The respondent seeks an affirmance of the Fourth Circuit's holding as the proper construction of the regulation.

The respondent hereinafter adopts the statement of the case as set forth in the brief for the federal respondent beginning with the first numbered subheading entitled "Statutory and Regulatory Framework" on page 2 and running to page 14. Exception is taken, however, to the third line of page 4 which should read ". . . unlike the Part B regulations. . . ."

The respondent takes exception to much of the petitioner's statement of the case, which is more in the form of argument, but will reserve his response for the argument section of his brief.

SUMMARY OF ARGUMENT

Congress, in authorizing the Secretary of Labor to promulgate the interim presumption now codified as 20 C.F.R. 727.203, directed the Department of Labor to consider all relevant evidence in adjudicating black lung claims under its regulations. The purpose of the directive was to prevent the Department of Labor from treating the presumption as irrebuttable. In promulgating 20 C.F.R. 727.203, the Secretary of Labor gave effect to that directive while giving every indication that the presumption could still be invoked much as it was under claims filed with SSA—by a single item of qualifying evidence. The Fourth Circuit gave such a construction to the regulation and should thus be affirmed.

The Fourth Circuit's interpretation of the interim presumption does not violate the Administrative Procedure Act because the Black Lung Benefits Act at 30 U.S.C. 932(a) allows exceptions to the act by regulation of the secretary and, further, the evidence of record is considered by the preponderance of the evidence rule prior to the administrative law judge's decision under 20 C.F.R. 727.203(b).

ARGUMENT

I

THE FOURTH CIRCUIT'S INTERPRETATION OF THE INTERIM PRESUMPTION IS CONSISTENT WITH THE PLAIN LANGUAGE AND INTENDED PURPOSE OF THE REGULATION.

The Fourth Circuit has given the interim presumption under 20 C.F.R. 727.203 a common sense construction and rejected the Director's interpretation of this regulation as internally inconsistent and contrary to its intended purpose. That the Director's proposed preponderance of the evidence standard for invocation of the presumption violates the purpose and plain language of the regulation is evidenced by both the legislative history leading to passage of the Black Lung Benefits Reform Act of 1977 (the "1977 amendments") (authorizing promulgation of the Part C interim regulations) and, more specifically, the comments of the Secretary of Labor issued in connection with the regulation's final promulgation. Together, these sources demonstrate that "[t]he Secretary [of labor] designed section 203(a) to give the coal miner the liberal advantages mandated by Congress. . ." as that section has been construed by the court below. *Stapleton* v. *Westmoreland Coal Co.*, 785 F.2d 424, 452 (4th Cir. 1986) (en banc) (Judge Sprouse).

At its inception, Title IV of the Federal Coal Mine Health and Safety Act of 1969 was considered an unusual piece of legislation in singling out the victims of one industry for compensation for an occupational disease. Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Session, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173) As Amended Through 1974 Including Black Lung Amendments of 1972* (Comm. Print Aug.

1975) at 522. The disease—pneumoconiosis, commonly known as black lung—was, however, recognized as probably the worst occupational disease in the country. *Id.* at 523. It soon became apparent that, in light of such a dramatic problem, Congress intended Title IV to provide a liberal system of benefit payments to the victims of black lung.

Such congressional intent was made most obvious in 1972 when Congress expanded the coverage of the program by amending the 1969 Act with the Black Lung Benefits Act of 1972 (the "1972 amendments"). Congress passed the 1972 amendments in response to the Social Security Administration's (SSA) eligibility criteria devised and promulgated by SSA for determining totally disabling pneumoconiosis pursuant to the 1969 Act. *See generally* S. REP. NO. 743, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2305 [hereinafter cited as S. REP. NO. 743]; *see also* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W.Va. L. Rev. 869, 870, 871 (1981). By 1972 the denial rate was more than 50% nationwide under the SSA criteria. S. REP. NO. 743 at 2307. Such a result was unacceptable by Congress in that "countless miners and their survivors who were intended beneficiaries of the Black Lung program" were in fact being denied benefits. *Id.* In short, Congress had expected, under the 1969 Act, a more complete solution to the problem. *Id.*

The implied directive in the Senate Report on the 1972 amendments was, therefore, that SSA use its rulemaking authority to improve upon its black lung approval rate. *See* Solomons, *supra* at 870, 871. SSA was also then presented in that report with the expectation of Congress

that SSA adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt review of thousands of claims previously denied. S. REP. NO. 743 at 2322.

SSA's response was the promulgation of what has come to be known as the "interim presumption." 20 C.F.R. 410.490. The SSA presumption, while made applicable to Part B claims only, would serve as the model for the presently contested Part C interim presumption promulgated by the Secretary of Labor. Like the interim presumption under Part C, the Part B interim presumption was divided into two parts, the first governing invocation of a presumption of total disability due to pneumoconiosis upon the establishment of certain medical and employment requirements with the second governing rebuttal of the presumption. 20 C.F.R. 410.490(b) and (c). The rate of approval of SSA claims increased steadily under this regulatory scheme. *See* DEPT of H.E.W., S.S.A., 2d ANN. REP. TO THE CONGRESS ON THE ADMINISTRATION OF THE BLACK LUNG BENEFITS ACT OF 1972 (1977).

In light of the success of the SSA presumption, at least from the claimant advocates' point of view, calls began to mount for the Department of Labor to adopt the presumption for use in the adjudication of Part C claims. Solomons, *supra* at 884. The rate of claims approved by the Department of Labor, which began its adjudication of Part C claims in July 1, 1973, was significantly below that of SSA. *Id.* at 873. The inapplicability of the SSA presumption to Department of Labor claims was recognized as perhaps the most significant factor accounting for the disparity. *Id.*

Congressional support for the expanded use of the interim presumption grew during the period from 1974 to

1977. *Id.* at 887. However, by the time the 1977 amendments were proposed, some members of Congress were becoming increasingly critical of the interim presumption as allegedly used by SSA. The allegation was that SSA was not considering any other evidence once the presumption was invoked, thus effectively using the presumption "not as a screening device to separate approvable claims from potential denials, but as an irrebuttable presumption which would permit the approval of large numbers of marginal claims with a minimum of effort and without full adjudication." *Id.* at 889, 890. The regulatory scheme was, not doubt, conducive to such a practice given the fact that:

> The presumption is extremely easy to invoke and by its terms permits an inference of critical facts which are not, medically speaking, justified by the invoking evidence. For example, it is well accepted that a chest radiograph showing early stage simple pneumoconiosis does not demonstrate a disabling respiratory impairment. Yet, under the presumption, a totally disabling impairment is presumed from this evidence alone.

Id. at 880 (footnotes omitted).

The version of the 1977 amendments that ultimately became law was the product of a conference committee compromise. Under the compromise, the Department of Labor would adopt an interim presumption much like that used by SSA, but would also begin to develop new medical eligibility regulations which would eventually supersede the interim presumption. *Id.* at 893. Furthermore, to insure that the Department of Labor would not engage in the alleged practice of SSA in adjudicating black lung claims, the legislation would contain the following mandate:

> In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials.

30 U.S.C. 923(b).

The Conference Report on the 1977 amendments explains that:

> With respect to a claim filed or pending prior to the promulgation of such [new] regulations such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the *Federal Register.*

H.R. Rep. No. 864, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 308, 309. Thus, "[b]y this [Conference Report] statement, the conferees alerted the Secretary of Labor that he was not to treat the interim presumption as irrebuttable." Solomons, *supra* at 893.

The Department of Labor's interim presumption codified at 20 C.F.R. 727.203(a) and (b) was published as a proposal on April 25, 1978. 43 Fed. Reg. 17732, 171770-71 (1978) (Notice of Proposed Rulemaking). The regulation was then adopted and published in final form without a single change on August 18, 1978. 43 Fed. Reg. 37662, 36825-26 (1978) (Notice of Final Rulemaking). Significantly, congressional staff had struck from an earlier

draft of the regulation a proposed provision requiring the weighing of all medical test evidence to invoke the presumption. *See*, Solomons, *supra* at 896. In the final publication, the Secretary of Labor responded to numerous comments concerning the application of the controversial "all relevant evidence" rule. The Secretary's response bears repeating at length:

> The many comments which urge that all relevant evidence should not be considered in rebutting the interim presumption must also be rejected. The Conference Report accompanying the 1977 Reform Act provides, in connection with the interim criteria, 'except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the FEDERAL REGISTER. . . .'
>
> Some of the commentators felt that the 'all relevant evidence' rule would cause claims adjudicators to ignore the presumption, and simply pick from all the evidence those items on which they wish to rely. This is certainly not authorized by the interim presumption. However, the Department believes that use of the presumption should be clarified.
>
> The interim presumption is, by statute, rebuttable and the Department has no authority to make it irrebuttable. Nor does the Department have authority to exclude any relevant evidence from consideration in connection with any case, or mandate a result which is contrary to the evidence in a case. However, the Department cannot, as has been requested by some, look for *the single item of evidence which would qualify a claimant on the basis of the interim presumption*, and ignore other previously obtained evidence. This does not mean that *the single item of evidence which establishes the presumption* is overcome by a single item of evidence

> which rebuts the presumption. The Act embodies the principle that doubt is to be resolved in favor of the claimant and that principle plays an important role in claims determinations both under the interim presumption and otherwise.

433ed. Reg. at 36826 (Emphasis added).

The Secretary's response clearly implies that one item of qualifying evidence would be sufficient to invoke the interim presumption with the presumption of total disability subject to rebuttal, whereupon all relevant evidence would be considered. Such a construction of the regulation is totally consistent not only with the historically liberal congressional attitude towards the black lung benefits program as described above, but with the structure and language of the regulation as well. First, as the court below observes, nothing in subsection 203(a) "permits—much less requires" the weighing of conflicting evidence before the presumption may be invoked. *Stapleton*, 785 F.2d at 434 (Judge Hall). Rather, the presumption is subject to be triggered by the production of either *a* chest roentgenogram (X-ray) or the documented opinion of *a* physician which meets certain regulatory requirements of authenticity and reliability, or by the production of either ventilatory studies or blood gas studies which meet the regulatory standards for how such studies are to be conducted.[1] 20 C.F.R. 727.203(a)(1)-(4). Second, the requirement that all relevant medical evidence shall be considered only appears in subsection 203(b) governing the rebuttal phase of the regulatory scheme. To incorpo-

[1] It should here be noted that the petitioner is clearly wrong in stating that the Fourth Circuit held that "any" evidence "will do" to invoke the presumption. As the court held, *Stapleton*, 785 F.2d at 426, the evidence must qualify as the regulations require. *See* 20 C.F.R. 410.428, 410.440, 718.102-718.105, 727.206(a).

rate the "all relevant evidence" rule back into subsection 203(a), as the Director would have this Court to do, strains the logical reading of the regulation.[2] As Judge Sprouse stated:

> It is easy to fault legislative draftmanship, but if, [as the court held], the drafters of this regulation intended only one X-ray to trigger the presumption, I cannot think of a better or simpler way of saying it. On the other hand, to hold that the drafters intended a preponderance standard to apply would be to accept a section 203(a)(1) as an example of intolerable drafting.

Stapleton, 785 F.2d at 453, 454.

Moreover, the practical effect of the Director's interpretation is to nullify the intended benefit of the interim presumption. Congress created Title IV as an unusually generous remedial program. Under the Fourth Circuit's construction of the regulation, the miner can raise the presumption of totally disabling pneumoconiosis with a minimum of evidence—evidence of less than total disability—and shift the burden of persuasion to the Director or coal operator to go forward under subsection 203(b) with rebuttal evidence disproving total disability due to pneumoconiosis. This procedure avoids placing on the miner, who can least afford it, the burden of responding, at least initially, to a plethora of medical evidence more

[2] In their briefs both the petitioner and the Director attempt to capitalize on the use of the word "establish" in subsection 203(a) in support of such a construction of this portion of the regulation. But as Judge Hall recognizes, "establish" as used in subsection 203(a) "simply means that the claimant must prove at least one of the factual prerequisites to invoke the presumption, i.e., one qualifying X-ray, one set of qualifying ventilatory or blood gas studies, or the documented opinion of one physician." *Stapleton*, 785 F.2d at 434.

easily generated by the operator. The Director's interpretation of subsection 203(a), however, in calling for all the evidence to be weighed before invocation of the presumption, "renders the rebuttal phase of the inquiry superfluous." *Stapleton*, 785 Fed.2d at 434 (Judge Hall).

The Director and petitioner attempt to defend the Director's interpretation as the long-standing administrative practice to which the courts should defer. Petitioner even goes so far as to state that "a weighing of all relevant evidence in the invocation phase" has been "the consistent and unwavering fifteen-year construction of the invocation provisions of the interim presumption by multiple Secretaries of HHS and Labor." Brief for the Petitioners, p. 33. Such an assertion should be taken as no more than a litigation position absent any statement of agency policy to that effect. The legislative history, in fact, indicts to the contrary. It was, as previously discussed, the allegations that SSA was not considering all the relevant evidence on application of the interim presumption that gave rise to the "all relevant evidence" rule to begin with in the 1977 amendments. Furthermore, in light of the Secretary of Labor's clear implication in promulgating the regulation that a single item of qualifying evidence would be sufficient to invoke the presumption, a position by the Department of Labor to the contrary would be clearly erroneous. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Administrative Procedure Act, 5 U.S.C. 552(a) (1982), moreover, appears to dictate that deference be given an agency interpretation of general application only if it is published in the *Federal Register*. *See Stapleton*, 755 Fed. 2d at 450, 451 (Judge Sprouse).

In sum, the statutory purpose in directing the inclusion of the "all relevant evidence" rule as part of the Depart-

ment of Labor interim presumption was to prevent the Department from treating the presumption as irrebuttal. In promulgating 20 C.F.R. 727.203, the Secretary of Labor gave effect to that directive while giving every indication that the presumption could still be invoked much as it allegedly was under claims filed with SSA—by a single item of qualifying evidence. The Fourth Circuit's decision giving such a construction to the regulation should thus be affirmed.

II

THE FOURTH CIRCUIT'S INTERPRETATION OF THE INTERIM PRESUMPTION DOES NOT VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.

A. Petitioners argue in their brief that Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d) requires the application of a preponderance of the evidence standard to the interim presumption invocation facts. The Black Lung Benefits Act, 30 U.S.C. 932(a) generally incorporates 30 U.S.C. 919(d), which in turn generally incorporates APA provisions including Section 7(c).

The petitioner states in his brief at page 37 that the general applicability of the APA in black lung claim proceedings is not in dispute. The respondent does not dispute that in some instances the APA is applicable, but under 30 U.S.C. 932(a), which is the section of the Black Lung Benefits Act which generally incorporates the APA, there is set forth an express exception to this incorporation where "otherwise provided . . . by regulations of the secretary." 30 U.S.C. 932(a).

Therefore, the statute that makes the APA applicable to the Black Lung Benefits Act clearly sets forth an

exception that if the secretary's regulations provide a different scheme then the APA would not be binding.

B. Even if the Administrative Procedure Act does apply to the interim presumption, the Fourth Circuit's holding in this matter does not violate the intent of Section 7(c) of the APA, 5 U.S.C. 556(d).

The petitioner in his brief cites from Section 7(c) of the APA, 5 U.S.C. 556(d),[3] which in part states "except as otherwise provided by statute, the opponent rule or order has the burden of proof. . . ." As the federal respondent points out in his brief at page 34 and 35, recent decisions of this court demonstrate that Section 7(c) addresses two separate questions: the burden placed upon the opponent of a particular order and the quantity of evidence necessary to sustain an agency's decision whether it is favorable or unfavorable to opponent. On the first question, Section 7(c) requires that the party advocating a particular result bear only a burden of production. *NLRB* v. *Transportation Management Corporation*, 462 U.S. 393, 403-404, note 7, 1983. On the second question, Section 7(c) requires that the agency's decision following an evidentiary hearing be based upon a preponderance of the evidence. *See Steadman* v. *SEC*, 450 U.S. 91, 95-106, 1981. *See generally* Attorney Gen.'s Manual on the Administrative Procedures Act, 75-77 (1947).[4]

Therefore, the Fourth Circuit's ruling in *Stapleton*[5] puts the burden of production on the claimant at the

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[3] Petitioner's brief, p. 41.

[4] Respondent, Luke R. Ray, quotes directly from federal respondent's brief at pages 34 & 35 because it sufficiently states Ray's position.

[5] *Stapleton* v. *Westmoreland Coal Co.*, 785 F.2d 424.

invocation stage and once that burden is carried the burden of persuasion is shifted to the Director or operator to rebut under section 20 C.F.R. 727.203(b). The regulation at 20 C.F.R. 727.203(b) provides that all relevant medical evidence shall be considered, therefore, prior to the administrative law judge rendering a decision, the preponderance of the evidence criteria is applied to all relevant evidence.

The respondent would point out to the court that the federal respondent supports the position of respondent, Luke R. Ray, on the effect of the APA preponderance requirements on the interim presumption, and opposes the petitioner's position.

CONCLUSION

The judgment of the Fourth Circuit, is a correct interpretation of the regulations set forth in 20 C.F.R. 727.203(a) and (b) and should be affirmed.

Respectfully submitted,

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